No. 14,724

IN THE

United States Court of Appeals

For the Ninth Circuit

HASKELL PLUMBING AND HEATING COMPANY, INC., a corporation authorized under the laws of the State of Washington and doing business in the Territory of Alaska,

Appellant,

vs.

JIMMY WEEKS, TOMMY JUDSON, MIKE CULLINANE, OLE FRANZ, ROY CALLAWAY, TOM MULCAHY, BEN HOLBROOK and JESSE HOBBS,

Appellees.

On Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF OF APPELLANT.

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JURISDICTION.

The jurisdiction of the District Court was invoked and authorized under the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended 48 U.S.C.A., Section 101 and Section 53-1-1, 1949 Alaska Compiled Laws Annotated. The Circuit Court of Appeals has jurisdiction in this matter by virtue of the provisions

of Section 1291, Chapter 92, of the Judiciary and Judicial Procedure Act, 28 U.S.C.A., June 25, 1948, c. 646, 62 Stat. 912; also, Section 8C of the Act of February 13, 1925, as amended. (28 U.S.C.A. 1294.) Practice in the District Court for the District of Alaska and appeals from the judgments rendered in said Court are all governed by the Federal Rules of Civil Procedure by virtue of 63 Stat. 445, 48 U.S.C.A. 103A.

STATEMENT OF FACTS.

This action was commenced by filing a complaint in the District Court for the Territory of Alaska, Third Division, at Anchorage. This complaint was joined into by Jimmy Weeks, Tommy Judson, Mike Cullinane, Ole Franz, Roy Callaway, Tom Mulcahy, Ben Holbrook, Jesse Hobbs, and W. Van Smith, plaintiffs. Haskell Plumbing and Heating Company, Inc., was the only defendant. The complaint consists of nine (9) separate causes of action for loss of personal property growing out of a fire that destroyed a metal quonset hut at King Salmon, Alaska. (Tr. 3-15.)

To this complaint, defendant filed a motion to dismiss and to strike. (Tr. 16-17.) In this motion the defendant contended that the Court should dismiss all of the purported causes of action, save and except possibly the first named plaintiff, Jimmy Weeks. The motion was also to strike all causes of action other than Cause of Action No. One, and contended that there was a misjoinder of causes of action and a misjoinder of plaintiffs in the complaint; that there was

no privy of contract in any way between the plaintiffs. They were not associated together, were not partners and were not joint claimants and had no legal connection whatsoever and were attempting to file a multiple suit against the defendant which was not authorized by law or by Rules 19 and 20 of the Federal Rules of Civil Procedure, claiming that this kind of action was not anticipated or covered by said rules and that the defendant could not have a fair and impartial trial in an action such as the one set forth in the complaint. That each of the claims set forth therein was in the nature of a jury case, but tried in such volume would confuse the jury beyond correction by the Court's instructions, and that the causes of action should therefore be dismissed, and in lieu of dismissal, should be stricken from the complaint, except the original plaintiff, Jimmy Weeks. And for the further reason that none of the causes of action even attempted to plead any set of facts whatsoever authorizing any one of the plaintiffs, or all, to recover any sums whatsoever. That the complaint was wholly inadequate and did not state facts sufficient to constitute a cause of action in any way in favor of the plaintiffs and against the defendant. This motion was heard and overruled and by our rules an exception allowed. The defendant was given twenty (20) days to answer.

An answer was filed by the defendant on May 7, 1953, which answered all of the nine (9) separate causes of action. (Tr. 18-22.)

After the answer was filed, interrogatories were propounded by the defendant, properly served on the

plaintiffs' counsel, who, in time thereafter, filed answers to the interrogatories.

At the commencement of the trial and before any evidence was introduced, the defendant moved to dismiss the plaintiffs' complaint and then it moved separately to dismiss each of the nine (9) causes of action. Then it moved separately to strike or dismiss, optional, all but the first cause of action on two grounds: (1) that there was a misjoinder of parties plaintiff and also a misjoinder of causes of action; and (2) that the allegations in the complaint were not sufficient to state a cause of action in favor of each individual plaintiff and against the defendant.

These motions were overruled by the court. When the first witness was called, the defendant objected to the introduction of any evidence on behalf of the plaintiffs for all of the grounds stated in the motions to dismiss. This objection was overruled and exception allowed.

At the close of the plaintiffs' testimony, defendant renewed its motions to dismiss and its objections to the introduction of any evidence and moved the Court to strike all of the testimony based upon the theory argued in the former motions; that is, improper joinder of parties plaintiff and that the complaint did not state a cause of action in favor of any of the plaintiffs against this corporate defendant. This motion was made separately as to each plaintiff. The defendant moved to strike the interrogatories and all of the contents thereof, that had been introduced in

evidence over the objections of the defendant, for the reason that they were improperly introduced and were not competent evidence; that the defendant was not permitted to cross-examine the witnesses. Therefore, the interrogatories had no place in the evidence in the case and were not admissible for any reason except for the impeachment of the witness making the statement, and would then be admissible only if offered by the adverse party.

A separate motion to dismiss was directed against the evidence for its failure to show any negligence on the part of the defendant or any breach of duty, it being argued to the Court that not a scintilla of evidence was introduced of any negligence on the part of anyone, except the bull cook, who one of the witnesses testified, mixed some gasoline in the stove oil out in the yard somewhere. The evidence showed that the bull cook was not an employee or connected with Haskell Plumbing and Heating Company, Inc., in any way. It was further shown and undisputed that the board and quarters were furnished by Gaasland, Inc., by the depositions of F. Murray Haskell (Tr. 394) and Douglas Blair (Tr. 389).

The motions to dismiss were summarily overruled by the Court because practically the same motion had been made and overruled at the beginning of the case.

The Court allowed argument on the motion to dismiss the actions in which the only evidence of the suffering of any loss or damage was the interrogatories filed by the plaintiffs. (Tr. 378.) The Court over-

ruled the motion to strike the evidence based solely upon the interrogatories and heard argument on the motion to dismiss for want of evidence. (Tr. 380.)

It was never argued or insisted by the plaintiffs that this bull cook was an employee of the Haskell Plumbing and Heating Company, Inc. Plaintiffs contended it made no difference. (Tr. 381.)

After argument the motion was denied and the Court asked for additional testimony on one matter. Floyd A. Lundquist, an insurance adjuster, was called and testified. (Tr. 414.) He merely testified to customs of settling cases of this kind. We contend that no part of this evidence was competent.

A certain contract entered into between the Plumbing-Heating and Piping Employers of Anchorage, Alaska, and Local No. 367 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-Fitting Industry of the United States and Canada was introduced in evidence as plaintiffs' Exhibit No. 1. (Tr. 426.) This was done over the repeated objections of the defendant for the reason that the defendant was not a party to the contract, it being a contract between separate and different parties other than the defendant here.

To the judgment as rendered, a motion for a new trial was filed, which is as follows:

> *"Motion for a New Trial*
>
> Comes now the Defendant above named and moves the Honorable Court to grant a new trial in the above entitled cause and for grounds of said motion states:

1. That the Court erred in overruling the Defendant's Motion to Dismiss the Plaintiffs' complaint for the reason that it constituted an improper joinder of parties plaintiff and an improper joinder of causes of action.

2. That the Court erred in overruling the Motion to Dismiss the Plaintiffs' complaint for the reason that the complaint did not state a cause of action in favor of any of the plaintiffs and against the defendant.

3. That the Court erred in refusing to sustain the defendant's separate motions against each and every one of the plaintiffs separately, for the reasons set forth above, all of which motions were made at the commencement of the trial of the case.

4. The Court erred in overruling the defendant's objections to the introduction of any evidence on behalf of the plaintiff, for all of the reasons set forth in the previous motions.

5. The Court erred in allowing over the objections of the defendant to be introduced in evidence, the interrogatories filed out and answered by the various plaintiffs.

6. The Court erred in overruling the plaintiff's Motion to Dismiss the entire case at the close of the plaintiffs' evidence.

7. That the Court erred in overruling the Defendant's Motion to strike all testimony as to each and every plaintiff individually which motion was made at the close of the Plaintiff's testimony.

8. The Court erred in allowing to be introduced in evidence the contract marked Plaintiff's

Exhibit Number 1 for the reason the same was incompetent, irrelevant, immaterial and not properly identified and not within the pleadings and issues involved.

9. The Court erred in denying the Plaintiff's motion to strike Exhibit Number 1 at the close of the Plaintiff's case.

10. The Court erred in denying the defendant's Motions made against each individual plaintiff to dismiss each individual complainant for the further reason that there was no proper proof of the measure of damages offered and no competent evidence introduced as to the value of the property lost.

11. The Court erred at the close of the evidence in denying the defendant's Motion to strike all testimony of the plaintiff.

12. The Court erred at the close of the evidence in overruling the defendant's motion to strike the interrogatories introduced over the objections of the defendant.

13. The Court erred at the close of the case in refusing to sustain the defendant's Motion to Dismiss the separate plaintiff's complaints for the reason that the evidence did not justify a Judgment in favor of any one separately or collectively of the plaintiffs.

14. The Court erred in refusing to strike all evidence of property lost as to each separate individual because there was no competent evidence as to the value of the property lost.

15. The Court erred in denying the defendant's Motion to dismiss made at the close of all

of the evidence against each plaintiff separately on the theory that there was no negligence proven as against the defendant.

16. The Court erred in rendering Judgment in favor of the Plaintiffs and each of them wherein he held that the bull-cook or the employees of the Gaaslin Company were the agents of the Defendant Haskell Plumbing Company by reason of the written contract introduced as plaintiff's Exhibit Number 1 and held further that the responsibility to furnish food and lodging could not be delegated to Gaaslin Company and further holding that even though the evidence was, that Haskell Company and its employees did not put this gas in the oil; it being the duty of the Haskell Company to see that these premises were safe; and by finding the defendant liable for this damage.

17. The Court further erred in rendering judgment in favor of the various plaintiffs for the amount sued for after a deduction of 30% of the amount claimed as in many instances there was no competent evidence offered and none received on behalf of the various separate plaintiffs and there being no competent evidence as to the extent of loss and there could be no legal reason to support a judgment in favor of each of the plaintiffs for any sum whatsoever.

The defendant moves this Honorable Court to set aside the judgment rendered and grant a new trial for all of the reasons above stated.

Dated at Anchorage, Alaska, this 12th day of January, 1955.

Bell & Sanders
/s/ By Bailey E. Bell,
Attorney for Defendant"

This Motion for a New Trial was overruled and the Notice of Appeal was filed (Tr. 128) and the case was brought to this Court for reversal.

Statement of Points Relied upon was filed. (Tr. 446.)

Trial.

On Wednesday, January 5th, 1955, this matter came on for trial before the Honorable Walter H. Hodge, District Judge. Plaintiff was present with Harold J. Butcher, attorney. Bailey E. Bell of Bell & Sanders represented the defendant.

After opening statements, William Cruthers was called as the first witness for the plaintiff. A transcript of his testimony, or the portion thereof involved in this appeal, is set forth in the Transcript of Record at pages 130-132.

Then Sam Odle was called. (Tr. 132-149.)

Then Roy Callaway was called as a witness. (Tr. 150-212.) The testimony in the Callaway cause of action was full and complete and the defendant was given a right to cross-examine Callaway as to the value of the articles, where he procured them, etc. But, thereafter no other witness called was asked to go into detail as to the value of his property.

The plaintiffs moved the Court to use the interrogatories and answers as proof and the only proof offered for each of the plaintiffs thereafter (save and except a deposition of Jesse Hobbs (Tr. 321) was merely testimony to describe the place they were work-

ing and living and an effort made to prove liability of the defendant. On each occasion the interrogatories were introduced in lieu of testimony as to damages suffered or loss resulting from the fire.

On page 222 of the transcript you find the following statements:

"Q. Now you lost certain personal property in this fire?

A. Yes, I did. (121)

Q. And that personal property, you have set forth in full, to the best of your ability, in answers to interrogatories that were submitted to you—answering in—I wonder if your Honor having the file could give me the date?

The Court. Oh, yes. Mr. Judson——

Mr. Butcher. Mr. Judson.

The Court. Mr. Judson. Yes. (The Court looks for the information.) The answer to interrogatories signed by Thomas B. Judson on February 8, 1957 (laughter). Yes, that is right—1957. Probably it is 1954 because it was filed on April 2, 1954, and with that correction——

Mr. Butcher. The interrogatories were submitted in 1953, Your Honor.

The Court. I see what's happened here. The notary taking the acknowledgment has used the same year date as when his commission expires, which no doubt explains the error. We will change this to '54, by leave of counsel. February '54.

Q. (by attorney for plaintiffs). Is that your recollection when you answered these interrogatories?

A. I believe so.

Q. And at that time, you set forth to the best of your ability, the items you lost and the price thereof. Is that correct?

A. That's right. (122)

Mr. Bell. Now, Your Honor, I want to cross-examine him about what he proved—or attempting to prove—and did not rely upon the interrogatories, but has attempted to prove by this witness that all of those prices in there are correct. Now I have a right to cross-examine him, Your Honor.

Mr. Butcher (laughter). If I were introducing a deposition, I'd still have to tie the deposition in with the facts and all that stuff.

The Court. I thought we could avoid all of this, but you did ask him whether the statements made in his answers to the interrogatories were correct answers to the best of his ability.

Mr. Butcher. Well, I withdraw that question, then, Your Honor, and ask that it be stricken.

The Court. I fear that it is too late. I would say that that opens the matter up for cross-examination.

Mr. Butcher. I withdraw it then and ask your Honor to disregard it and to strike it from the record.

Mr. Bell. I think he's laid it open now.

The Court. I doubt if we can do that now.

Mr. Butcher. Well, then, Your Honor, if Your Honor can't entertain that, I insist if I have not tied this witness into that deposition, as the Tommy Judson who took that deposition, and that those were his answers, then he could have found fault with that, and I did it simply to avoid (123) argument. Now, certainly we have no jury

here, and if I withdraw that, Your Honor is going to have the depositions before him, or the interrogatories and I withdraw any reference that this witness made to those interrogatories; except, perhaps, I am sure I've got to ask him if he —— I want you to understand that I am not asking him one word about the property that he has lost, and I've certainly got to tie them in with the deposition someway, and I think that I should at least ask him if he is the Tommy Judson who answered certain interrogatories propounded to him and then stop there. Now, if I withdraw all but that——

The Court. Well, upon further reflection, I believe that it is the right of a party to withdraw the question and the answer to that question. It is rather unique in my experience, but I believe it can be done. And therefore such may be ordered. It is not the purpose, counsel, to in this ruling to try and hide anything but to simplify the issues for trial."

This should be coupled with the other arguments with the Court where the Court accepted the interrogatories on file in the case in lieu of any testimony as to the value of any articles lost or damages suffered, and then denied the defendant the right to cross-examine the plaintiffs on the matters set forth in the interrogatories, permitting the defendant only to examine the plaintiffs with relation to the testimony introduced in chief which in no way attempted, or even made an effort to prove the actual damages claimed to have been suffered. The entire record is full of the same acts.

Mr. Butcher, attorney for the plaintiffs, called the following witnesses: Jimmy Weeks, Mike Cullinane, Ole Franz, Tommy Judson, Tom Mulcahy and Ben Holbrook, and made certain proof as to the fire and what took place, and then rested upon the interrogatories filed in the case and never once made the slightest effort to prove the extent of the damages suffered by any of the plaintiffs. The defendant was not permitted to cross-examine any of the witnesses on the extent of damages suffered by them and was not even permitted to cross-examine the witnesses while on the witness stand as to the statements made by them in answer to the interrogatories. This same thing happened with each and every witness all the way through the case down to the time the deposition of Jesse Hobbs was introduced. (Tr. 321-369.)

ARGUMENT.

The first and second statements of points relied upon are hereby grouped for argument. They are as follows:

1. THE COURT ERRED IN HOLDING THAT THE ANSWERS TO THE INTERROGATORIES SUBMITTED FOR DISCOVERY BY THE DEFENDANT IN THIS CASE AND THE ANSWERS GIVEN BY THE VARIOUS PLAINTIFFS WAS COMPETENT EVIDENCE, AND IN ALLOWING THE SAME TO BE INTRODUCED IN LIEU OF ANY EVIDENCE AS TO THE NUMBER AND KIND OF ARTICLES DESTROYED AND THE VALUE THEREOF, IN LIEU OF DIRECT EVIDENCE OF THE WITNESSES, EVEN THOUGH THEY WERE PRODUCED IN OPEN COURT, AND THE DEFENDANT WAS DENIED THE RIGHT TO CROSS-EXAMINE THE WITNESSES ON THE THEORY THAT THE ANSWERS GIVEN TO THE DISCOVERY INTERROGATORIES WERE FINAL AND THE JUDGMENT HEREIN WAS BASED THEREON.
2. THERE WAS NOT A WORD OF EVIDENCE PRODUCED AT THE TRIAL AS TO THE AMOUNT AND KIND OF PROPERTY LOST OR THE VALUE THEREOF OR THE DAMAGES SUFFERED BY THE FOLLOWING NAMED PERSONS: JIMMY WEEKS, MIKE CULLINANE, OLE FRANZ, TOMMY JUDSON, TOM MULCAHY, AND BEN HOLBROOK, AND THE JUDGMENT AS RENDERED WAS BASED SOLELY UPON THE ANSWERS TO THE DISCOVERY INTERROGATORIES SERVED BY THE DEFENDANT AND ANSWERED BY THE VARIOUS PLAINTIFFS AND FILED IN THE CASE; THIS PART OF THE RECORD BEING INTRODUCED OVER THE OBJECTION OF THE DEFENDANT, WHICH THE DEFENDANT CONTENDS WAS NEVER ADMISSIBLE AS EVIDENCE, AND THE MOTION FOR JUDGMENT OF DISMISSAL AT THE CLOSE OF THE PLAINTIFFS' EVIDENCE AND AT THE CLOSE OF ALL OF THE EVIDENCE, AS TO EACH OF THE LAST ABOVE NAMED PLAINTIFFS, SHOULD HAVE BEEN SUSTAINED, THERE BEING NO EVIDENCE OF LOSS OF PROPERTY OR THE VALUE THEREOF OR THE DAMAGES SUFFERED, IF ANY.

Rule 33, of the Federal Rules of Civil Procedure, authorizes either party to serve on the adverse party

interrogatories after the commencement of the action, and provides that the interrogatories be answered separately and fully, in writing, under oath. These interrogatories were specifically for discovery purposes and were never intended as evidence in the case. Paragraph 778, *Federal Practice and Procedure,* Barron & Holtzoff, under Rule 33, states:

> "778. Use of Answers to Interrogatories
>
> Answers to interrogatories are not considered evidence unless offered as such at the trial. As originally adopted, Rule 33 contained no provision as to the use of answers to the interrogatories at the trial. It was held that such answers could be introduced in evidence *by the interrogating party* as admissions against interest on the *part of the answering party,* or for impeachment, *but that a party could not generally introduce his own answers to his opponent's interrogatories, since they would be self-serving statements.* * * *"

Rule 33 provides for the submitting of interrogatories to the parties, by the adverse party in the action, and Rule 33 as amended reads as follows:

> "Interrogatories may relate to any matters which can be inquired into under Rule 26 (b), and the answers may be used to the same extent as provided in Rule 26 (d) for the use of the deposition of a party."

Apparently Rule 26 (b) is controlling as to the admissions in evidence of any portion of the answers to the interrogatories 26 (b) or the pertinent portion thereof is as follows:

"(b) Scope of Examination.

*Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. * * *"*

Then to clarify Rule 26 (b) above stated, we quote 26 (d) as follows:

"(d) Use of Depositions.

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used *against any party* who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) *Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.*

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, *that the witness is*

dead; or 2, *that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or* 3, *that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or* 4, *that the party offering the deposition has been unable to procure the attendance of the witness by subpoena;* or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used * * *". (Emphasis ours.)

We have many cases holding that the deposition does not become evidence in the case until offered as such and received as evidence by the Court, and Barron and Holtzoff, Volume 2, that we have used above to quote from, was copyrighted in 1950 and the amendments to Rule 33 and to Rule 26 were adopted December 27, 1946, and for some reason did not become effective until March 19, 1948, and the works of Barron and Holtzoff being copyrighted more than two (2) years thereafter, contain the rules as amended. So apparently there is no other amendment affecting these two (2) rules, and under Rule 33, we find cited the case of *Bailey v. New England Mutual Life Insurance Company of Boston, Massachusetts,* 1 F.R.D. 494. This seems to have been the first case that we were able to find directly in point. The second syllabus of the above case reads:

"2. Courts.

The answers to interrogatories to adverse parties, taken under Federal Rule of Civil Procedure No. 33, may be used as a confession or for impeachment under the general rule of evidence and not because the rule itself so provides, *but may not be used by the answering party as a self-serving statement, free from the hazards of cross-examination.* Federal Rules of Civil Procedure, rules 26, 33, 28 U.S.C.A. following section 723c. * * *" (Emphasis ours.)

And from the body of the opinion we quote:

"[2] The answers, not because Rule 33 so provides, but, under the general rule of evidence, may be used, as a confession, or for *impeachment but not by the answering party as a self-serving statement free from the hazards of cross-examination.* * * *"

And then quoting from syllabus 6, same case, as follows:

"6. Courts.

Where plaintiff in preparing his case for trial served upon defendant written interrogatories to be answered as provided by Rule 33 of the Federal Rules of Civil Procedure, and after answering the interrogatories defendant, within 15 days, served a copy of the answers on plaintiff *defendant was not entitled to offer the answers to the interrogatories in evidence over plaintiff's objections.* Federal Rules of Civil Procedure, rule 33, 28 U.S.C.A. following sec. 723c. * * * *" (Emphasis ours.)

Another case that it quite early and apparently in point is *United States v. General Motors Corporation, et al.,* 2 F.R.D. 528. The fourteenth syllabus reads as follows:

> "Answers to interrogatories do not become 'evidence' in the case unless voluntarily *introduced by interrogator as admissions against interest* on part of party being interrogated. Federal Rules of Civil Procedure, rule 33, 28 U.S.C.A. section 723c. * * *"

And from the body of the opinion on page 532, we quote:

> "* * * but if the answers are not satisfactory or useful, the time spent in considering them and the objections thereto is generally wasted, because the answers do not become evidence in the case unless voluntarily introduced *by the interrogator as admissions against interest on the part of the party interrogated.*"

Another case that is in point is *Coca Cola Company v. Dixi-Cola Laboratories, Inc.,* 30 F. Supp. 275. The eighth syllabus is directly in point and reads as follows:

> "8. Courts.
>
> Answers to interrogatories do not become evidence in the case unless voluntarily *introduced by the interrogator as admissions against interest on the part of the party interrogated.* Rules of Civil Procedure for District Courts, rules 33, 37, 28 U.S.C.A. following section 723c." (Emphasis ours.)

This syllabus is supported in the opinion on page 270, and we wish to quote the following:

> "* * * The purpose of the interrogating party is to develop information or force admissions; but if the answers are not satisfactory or useful, the time spent in considering them and the objections thereto is generally wasted, *because the answers do not become evidence in the case unless voluntarily introduced by the interrogator as admissions against interest on the part of the party interrogated.*" (Emphasis ours.)

Another case decided February 8, 1951, by the United States District Court in the Western District of Pennsylvania is identical as to the facts in many ways with the case at bar. This is *United States v. Smith,* 95 F. Supp. 623 and the ninth syllabus is supported throughout the opinion and, therefore, we would like to quote the ninth syllabus as it is concise and to the point.

> "9. Federal civil procedure.
>
> In action by the United States against landlord to recover rent overcharges under the Housing and Rent Act of 1947, as amended, it would not be proper for landlord to establish defense by use of interrogatories relating to amount of rental which landlord contended she had received from tenant *since they were mere self-serving statements and had no evidentiary value.* Fed. Rules Civ. Proc. rule 33, 28 U.S.C.A.; Housing and Rent Act of 1947, 206 (a, b), as amended, 50 U.S.C.A. Appendix 1896 (a, b)." (Emphasis ours.)

It seems difficult to find a large volume of cases on this question, as apparently very few efforts have been

made to transgress the old standard rules as to the admissibility of evidence, and apparently the only time that a witness has appeared in Court and testified in the case, and the lawyer representing the witness stopped his testimony at a certain point and then introduced the interrogatories and answers as the evidence, and the only time that we are able to find where the trial judge allowed this to be done is the case at bar.

It should be clearly brought out that there was some evidence as to damages suffered in the portions of the case affecting the cause of action in favor of Roy Callaway and the deposition taken by the plaintiffs effecting the claim of Jesse Hobbs. There was no testimony of any damages suffered or the value of any property lost, save and except the interrogatories that were introduced, over defendant's objections, for and on behalf of Jimmy Weeks, Mike Cullinane, Ole Franz, Tommy Judson, Tom Mulcahy, and Ben Holbrook, and the judgment rendered in favor of these plaintiffs was based *solely,* as far as any damages suffered or property loss, on the interrogatories and answers by these said plaintiffs themselves, and were purely self-serving declarations, and were not competent evidence, and were introduced over the objections of the defendant while each of the plaintiffs, above named, were present in Court, and, therefore, were not the best evidence, and were not admissible, and a judgment based thereon is lacking in any evidence whatsoever as to any damages suffered or any property loss, and, therefore, the Court should have sus-

tained the defendant's motions to dismiss said plaintiffs' causes of action, or in the alternative, to render judgment for the defendant, as to the said defendants above named, and the Court having refused to do this, made a reversible error, and the judgment is erroneously entered and should be reversed with an order directing the lower Court to render judgment for the defendant.

SECOND ARGUMENT.

Third and fourth statements of points will be grouped under this heading and argued together. They are:

> "3. That the only testimony given in the trial of the case from the witness stand as to loss of property and the value thereof, was that of Roy Callaway, who was the first Plaintiff called as a witness, and by the deposition in support of the claim of Jesse Hobbs. A different rule of law applied as to the error committed by the Court in overruling the Motions to Dismiss as to these two particular Plaintiffs, due to the fact that there was evidence introduced as to the loss of articles and as to the value thereof by these two Plaintiffs, and our contention as to the error committed as to these two Plaintiffs is:
>
> (a) That the Judgment was based upon an erroneous conclusion as to the proof of value and based upon the wrong measure of damages;
>
> (b) That no cause of action in favor of these two particular Plaintiffs, or any of the Plaintiffs, was actually proven;

4. Defendant contends that the undisputed evidence shows that Haskell Plumbing and Heating Company, Defendant, did not furnish the food or lodging to any of the Plaintiffs; that that was furnished by the general contractor, Gaasland Company, Inc., as is shown by the depositions of F. Murray Haskell and Douglas Blair, which stand undenied by any one."

The evidence most favorable to the plaintiffs, Roy Callaway and Jesse Hobbs, was to the effect that one of the plaintiffs, to-wit: Jimmy Weeks, testified (Tr. 248):

"A. I seen the bull cook, or whatever he was, put it in one day. He was filling the barrels. I went back to the barracks one afternoon, I run out of cigarettes, and went back to the barracks and he was filling the tanks while I was there, and I stopped and talked to him and watched him fill the tanks.

Q. And what was he doing?

A. He was filling the tanks.

Q. And what was he putting in the tanks?

A. Well, he had a pump and he pumped in diesel oil, and then out of another barrel he pumped in gas.

Q. Did you call his attention to the feature of that?

A. Yes, and he said, 'we are hoping this will stop the stoves carboning up like they have been carboning up.'

Q. You called his attention to the fact that he was mixing gasoline with fuel oil?

A. Yes.

Q. Now I don't want you to tell me what he said. Did you go any further than that; did you point out anything to him?

A. Well, I pointed out it was a poor practice.

Q. For what reason?

A. Gasoline and oil doesn't mix too well. If they happen to not mix too well and had to settle, the gasoline would hit that stove straight. It is very possible it could cause an explosion." (Testimony of Lyle Wesley Franz.)

Then on cross-examination commencing on Tr. 259-261 you find practically every word of the testimony that in any way purports to show negligence on the part of anyone for the cause of the fire:

"Q. Now, what day was it you went after the cigarettes?

A. I would say the first part of August—the first part of October. Pardon me.

Q. And they had a 50 gallon barrel at the time there, and connected to the stoves, did they?

A. Yes.

Q. And this man was filling that 50 gallon barrel?

A. There was more than one 50 gallon barrel on the stand. I forget, I believe there was three.

Q. And were they all fastened together or not?

A. Yes. They was hooked up together.

Q. *Do you know who that fellow was that you saw around the place. You don't know what his name was*——

A. No——

Q. *Do you know any connection he had there?*

A. *No, I don't.*

Q. *Had you even seen him before?*

A. *No.*

Q. *Had you ever seen him around the cooking place—or the eating place?*

A. *Not that I remember of.*

Q. *You just happened to see him that one time there?*

A. *That's true.*

Q. Now what—Excuse me, Your Honor, I will pass this right back. (Gave file to Court.)

The Court. You may keep it if you wish.

Mr. Bell. No, thank you.

Q. (by attorney for defense). When you ate there, you ate with about a hundred or a hundred and fifty people there, did you not?

A. Possibly. I suppose, yes.

Q. *After you saw this then, you went right on staying in the place; after you knew this was a dangerous process, you went right on staying there, did you?*

A. Yes.

Q. And you told the job steward, and you told other people about this dangerous system, did you?

A. Yes.

Q. And then you kept right on staying?

A. Yes." [167]

"Q. *You knew it was very dangerous, didn't you. To mix gasoline with oil and for a stove?*

A. Yes.

Q. *You knew it was very dangerous, didn't you?*

A. *Yes.*

Q. *And you went on and stayed just the same?*

A. *Yes.*

Q. Where did you stay after the fire?

A. We moved into another barracks.

Q. Where was the other barrancks?

A. Well, in the same area.

Q. There was a lot of barracks there, were there not?

A. True.

Q. And did you know the Gaasland people—Gaasland Construction Company?

A. Not personally. No.

Q. You knew they were the general contractors on the job?

A. Yes.

Q. *And of course when that barracks burned, they took you to some place else to stay, did they?*

A. Yes.

Q. Was it a similar barracks?

A. Somewhat similar.

Q. Now, why do you say this was a bull cook that you saw mixing that?" [168]

"A. I don't recall saying he was a bull cook. I said he could have been a bull cook. I do not know what he was.

Q. You don't know whether he was a bull cook or not?

A. No, I don't.

Q. I see. You say you went after these cigarettes about October first?

A. The first part of October, yes.

Mr. Bell. All right, that's all."

Then you read this in connection with the depositions of Douglas Blair (Tr. 389) who testified that he was an accountant and was familiar with the enterprise at King Salmon being constructed by Gaasland Construction Company. He was assistant secretary and acting office manager and accountant for Gaasland

Company during that period. He saw all the subcontracts, pay rolls, and agreements; that Gaasland Company was the prime contractor on that job, and there were a number of subcontractors, including Haskell Plumbing and Heating Company. On Tr. 391 you find this testimony:

"Q. Now what was the arrangement between Haskell and Gaasland Companies regarding the board and lodging of Haskell's employees at Naknek?

A. The arrangement was that Gaasland Company should operate a camp where room and board would be furnished to their own employees, those of Haskell Plumbing & Heating Company, as well as those of other subcontractors on the job.

Q. Did these various subcontractors, including Haskell, have any direct hand in the management of the boarding and lodging camp?

A. None whatsoever.

Q. Whose employees operated that boarding and lodging camp?

A. The employees of Gaasland Company, Incorporated.

Q. And to whom did the hut belong which burned in October of 1951 in which these plaintiffs were lodged?

A. I wouldn't state to whom it belonged. The camp proper belonged to the C.A.A., was leased by them to the Alaska Salmon Industry, and with the permission of the C.A.A. by the Alaska Salmon Industry to Gaasland, so that Gaasland was not the owner of any of the buildings. However, all of the buildings were operated by and under the jurisdiction of Gaasland Company.

Q. Who hired the camp steward?

A. We hired the camp steward, the cooks, the bull cooks, and any other personnel working in the camp.

Q. Who inspected and maintained the Quonset huts in which the subcontractor's employees lived?

A. All of the camp was inspected and maintained by Gaasland Company. I would assume the inspections to be made by the camp manager.

Q. And who was that in October of 1951; do you recall?

A. I believe it to have been Lee Post, who was camp manager there. The previous camp manager was named Joe Nord, but I believe that he was gone and had been replaced by Post at that time.

Q. Now, you used the expression 'bull cook.' What is a bull cook?

A. The bull cook was an employee who cleaned quarters, made beds, changed linen, and was generally responsible for keeping the camp and quarters in a neat orderly condition.

Q. Who purchased the groceries that were eaten by the plaintiffs and the other subcontractors' employees?

A. Gaasland Company.

Q. And who purchased the fuel oil which was burned to keep the Quonset huts warm?

A. Gaasland Company.

Q. And do you know what kind of fuel was burned in the Quonset hut in question?

A. No, I do not. To the best of my knowledge all of them were heated by stove oil supplied by the Standard Oil Company of California at Naknek. It was barged up river to the job.

Q. Was there a written contract between Haskell and Gaasland providing for the lodging and boarding of these plaintiffs and other Haskell employees?

A. To the best of my recollection there was no such agreement.

Q. What was the arrangement?

A. As I recall, one of the provisions of the agreement with Haskell Plumbing & Heating Company was that they should be compensated for all of their costs in connection with their subcontract, and that they should receive a certain additional amount over and above the costs. There was, therefore, no object in Gaasland Company's billing subsistence and quarters to Haskell only to have Haskell bill them back to Gaasland Company. That, to the best of my recollection, explains the absence of any agreement as to a specific amount to be charged.

Q. Gaasland just picked up the check as it came along?

A. That is correct.

Q. I see. To your knowledge did the Haskell Company at any time undertake the inspection and maintenance of the Quonset hut in question prior to the time of the fire?

A. I am sure they did not." (Deposition of Douglas Blair.)

Then F. Murray Haskell testified that he was secretary of the Haskell Plumbing and Heating Company, Inc., in October, 1951, and at the time of the fire involved herein, he took part in the active management of the corporation. (Tr. 394.) He testified that he was familiar with the Quonset hut which was involved

in the fire. That it was not the property of the defendant, Haskell Plumbing and Heating Company, Inc., and belonged to Gaasland Construction Company and had never belonged to Haskell Plumbing and Heating Company, Inc. That the Haskell Plumbing and Heating Company had never undertaken the maintenance of that hut and its equipment where the plumbers, who were hired by the Haskell Plumbing and Heating Company, were living. At first the plumbers were kept at the Sky Motel and Gaasland Construction Company paid for their keep. None of the bills for board and room for the plumbers were ever sent to or paid by the Haskell Plumbing and Heating Company, Inc. The plumbers stayed there approximately two (2) months. Then Gaasland Construction Company made the Quonset hut available for the plumbers. Then Gaasland Construction Company arranged for all eating and rooming for all subcontractors. The facilities were purchased by the subcontractors from the Gaasland Company by the man-day of the general contractor, which was Gasland Construction Company (Tr. 396-397) the same as all other subcontractors on the site. Haskell Plumbing and Heating Company paid a per man-day rate for the care of their employees, and all facilities were provided by Gaasland Company. Gaasland Construction Company hired all the personnel to take care of the eating and housing, and also the hot water heater and heating facilities in those huts. That at no time did Haskell Plumbing and Heating Company provide or maintain housekeeping facilities, had no staff which

provided lodging or messing facilities for any of the people. They had no bull cooks, and the Gaasland Company furnished all board and lodging facilities. (Tr. 398-399.)

Then after this evidence was in, the case was closed, and the defendant moved to strike all the testimony as to both, the oral and the interrogatories, before the Court. Then a separate motion was made to strike the interrogatories for the reason that they were not admissible in evidence at all, and were not the best evidence. Then it was moved to dismiss the entire case for the reason that there was no cause of action proven against the defendant, Haskell Plumbing and Heating Company, Inc. Then (Tr. 411) after additional proceedings took place, the defendant moved to strike all of the testimony on the same grounds set up in the motion to dismiss which included a motion to dismiss on account of failure of the complaint to state a cause of action; and that there was a misjoinder of parties. These two motions were denied. Then defendant moved to strike the interrogatories on the theory that they were improperly introduced and were not competent evidence. This motion was overruled. Then defendant moved to strike the plaintiffs' Exhibit number one, which is a contract referred to and introduced, over the objections of the defendant, which shows on its face to be a contract between the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the employers of the group named, for the reason Haskell Plumbing and

Heating Company, Inc., was not a party to the contract and is not binding on it. This motion was denied. Then the defendant moved to dismiss plaintiffs' action on the grounds that there was no competent evidence as to any damages suffered and there had been no competent evidence of the value of the property lost, and no evidence of negligence or breach of duty on the part of the defendant. All motions were both joint and several as to all plaintiffs.

The second argument should be divided into three subdivisions, and we will proceed to argue them as follows:

A. There was no evidence of any negligence whatsoever on the part of Haskell Plumbing and Heating Company, the only defendant herein; that there was no testimony offered anywhere to the effect that an agent, servant, employee, or any officer of said corporation committed any act of negligence of omission of duty to the plaintiffs or any of them. The testimony above quoted is the sole and only testimony of any negligence of anyone, and the witness who testified to it did not know who the man was, that he claims mixed the gasoline with the stove oil; does not know for whom he was working or by whom he was employed, if at all; does not know of any negligence whatsoever of any one that would bind the defendant. For the sake of argument, let us assume that there was negligence that took place by mixing this gasoline with stove oil; then somebody might be liable, but the Court would have to look far beyond the evidence adduced to determine whose negligence caused the

damages and certainly the defendant, Haskell Plumbing and Heating Company, was not negligent, as the evidence shows conclusively that the man referred to as mixing the gasoline and stove oil was not an employee, agent, servant, or officer, or in any way connected with the defendant, and to make the defendant liable, there must be evidence to connect the negligence of this said man with the defendant, or the motion of the defendant for a judgment in its favor should have been sustained.

We have had a great deal of disappointment in trying to find a case directly in point, but there seems to be none. However, the law involved in the case is rather definite and certain.

We call your attention to the case of *Russell v. Oregon Short Line R.R. Co.,* 155 F., p. 22. The first syllabus reads as follows:

> "1. Trial—Direction of Verdict—Questions of Negligence. While questions of negligence are ordinarily for the jury in federal courts, a case may be withdrawn from the jury and a verdict directed for plaintiff or defendant, as may be proper, where there is no conflict in the evidence, or where it is so conclusive in its character that the court, in the exercise of its sound judicial discretion, would be obliged to set aside a verdict rendered in opposition to such evidence.
> (Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, 376-395; vol. 37, Negligence, 277-286.)"

We are citing the syllabus only in this case, as the body of the opinion supports it conclusively, and especially the quotation starting on page 25.

In a later case, *Shewmaker v. Capital Transit Co.,* 143 F. (2d) 142, the second and fourth syllabuses read as follows:

"2. Negligence 136(9).

In action founded on negligence, where no reasonable man could reach a verdict in favor of plaintiff, defendant's motion for directed verdict should be granted."

"4. Negligence 136(5).

In a negligence action, the burden is on plaintiff to establish negligence and injury alleged, and, if evidence fails adequately to support either element, defendant's motion for directed verdict should be granted."

This same rule is found in the following cases:

Capital Transit Co. v. Gamble, et al., 160 F. (2d) 283;

Abbott v. Railway Express Agency, 108 F. (2d) 671;

Seregos, et al. v. C. W. Good, Inc., 193 F. (2d) 741.

There being no evidence of any kind that the man who was seen mixing this oil to be an employee of the defendant or in any way connected with the defendant, and not even a scintilla of testimony of negligence on the part of the defendant, then the Court should have sustained the defendant's motion to dismiss or should have rendered judgment for the defendant and against all of the plaintiffs.

B. The plaintiffs testified of the knowledge of the danger of mixing gasoline with stove oil; testified of

reporting this matter to at least a part of the other plaintiffs herein and admitted going on living in the premises knowing explicitly the danger involved and, therefore, assumed the risk.

65 Corpus Juris Secundum, 848, Section 174, reads:

> "Under a doctrine referred to as the doctrine of assumed or incurred risk, and on the basis of the maxim, 'Volenti non fit injuria', is the rule that one who voluntarily exposes himself or his property to a known and appreciated danger due to the negligence of another may not recover for injuries sustained thereby."

This is so universally held that a citation of a lot of authority would be an imposition on this Court, but we will cite in support thereof, the case of *Surface v. Safeway Stores, Inc.,* 169 F. (2d) 937, and will quote from the body of the opinion on page 942, as follows:

> " 'The maxim "volenti non fit injuria" means: *If one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom.* The maxim is predicated upon the theory of knowledge and appreciation of the danger and voluntary assent thereto.' 12 N.W. 2d at pages 84, 88." (Emphasis ours.)

C. The testimony above quoted shows that the plaintiffs well knew of the dangers in living in the Quonset hut, after seeing and knowing of the mixing of the oil and gasoline, and their action in continuing to live there and making no effort to correct the con-

ditions known by them to be dangerous, made them guilty of contributory negligence, and the Court should have sustained the defendant's motion for judgment at the close of all of the evidence as well as at the close of the plaintiffs' testimony, and the failure of the Court to sustain the defendant's motion, therefore, we contend was error.

We quote in support of the above statement, from *Cary Bros. & Hannon v. Morrison,* 129 F. at 177, the third and fourth syllabuses, as follows:

"3. Same—Unheeded Warning—Contributory Negligence.

It is the duty of one who is lawfully using property near to that upon which another is legally engaged in blasting, and who is warned of a coming explosion, to use reasonable diligence to escape from danger on account of it; and failure to exercise such care, which concurs in producing his injury, waives his right of action for the trespass, and constitutes contributory negligence, which is fatal to his action for damages for the injury."

"4. Contributory Negligence—Question for Jury. Exception.

The question whether or not one is guilty of contributory negligence is ordinarily for the jury. It is only when the facts which condition the question are stipulated, or are established by testimony which is free from substantial conflict, and the inference from the facts is so certain that all reasonable men, in the exercise of a fair and impartial judgment, must agree upon it, that the question of contributory negligence may be lawfully withdrawn from the jury."

We have mentioned assumption of risk and contributory negligence solely as a precautionary measure in case this Honorable Court should overrule the former arguments. We think that the question of contributory negligence is elementary in this case, because there is no evidence to indicate that the defendant knew or had any reason to know or believe that gasoline was being mixed with the oil used in the Quonset hut where the plaintiffs were sleeping, as the evidence is conclusive that the defendant had nothing to do with the maintenance of the Quonset hut or the heating thereof, and there is indisputable evidence that the plaintiffs themselves knew of the mixing of this oil, knew it to be extremely dangerous, and then voluntarily continued to live in the Quonset hut, and continued to leave their personal property there and we feel that contributory negligence was proven by a statement of facts made on the part of the plaintiffs themselves, and nowhere denied or modified. Therefore, it had become conclusive and it was the duty of the Court to dismiss the plaintiffs' causes of action and/or render judgment for the defendant.

CONCLUSION.

In conclusion, we wish to emphasize the fact that we believe that the question covered under Argument One should be conclusive as to all of the parties except Roy Callaway and Jesse Hobbs, and if our contention is right, then there is no evidence of any damage suffered or loss sustained as to all of the rest of

the plaintiffs, and Argument Two clearly sets forth our contention to the effect that there was no negligence proven on the part of the defendant and no connection made between the defendant Haskell Plumbing and Heating Company, and the only act of negligence complained of was the fellow that put some gasoline in the oil in the tanks, and it was clearly established and undenied that Gaasland Company furnished the barracks, furnished the oil, took care of the barracks, and fed the men, and surely the plaintiffs have sued the wrong corporation as the defendant herein. This being established, conclusively, and undenied, we believe the judgment of the lower court should be reversed as to all plaintiffs, and the judge of the lower Court should be directed to enter judgment dismissing all of the plaintiffs' causes of action and enter judgment for the defendant.

Dated, Anchorage, Alaska,
November 4, 1955.

Respectfully submitted,
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